Editor's note: appeal filed, Civ.No. 3-88-351 (ED Tenn. May 18, 1988).

CLARK COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-627, 87-348 Decided April 15, 1988

Petition for discretionary review of a decision of Administrative Law Judge David Torbett, affirming issuance of Notice of Violation No. 84-091-162-006 and a proposed civil penalty of $1,100, and applica- tion for review of decision upholding Cessation Order No. 86-91-054-001. NX 5-42-P and NX 6-60-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees--Surface Mining Control and Reclamation Act of 1977: Permits: Transfer, Assignment, or Sale of Rights

   Under sec. 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1271(a) (1982), a permittee of a mine site is a proper party to be cited for a violation of the Act notwithstanding the fact the coal was removed by a third party. Pursuant to sec. 511(b) of Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1261(b) (1982), a permittee may not transfer, assign, or sell rights granted under any permit without the written approval of the regulatory authority. Hence, a purported assignment of the permittee's rights under the permit to a third party will not suffice to relieve the permittee of liability for violations of the Act in the absence of an approved assignment.

APPEARANCES: Lawrence H. Bidwell, IV, Esq., Knoxville, Tennessee, for Clark Coal Company; R. Anthony Welch, Esq., Judith M. Stolfo, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Clark Coal Co. (Clark Coal) has filed with the Board a petition for discretionary review of the February 19, 1986, decision of Admini- strative Law Judge David Torbett affirming Notice of Violation (NOV) No. 84-091-162-006, issued to petitioner pursuant to section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1271(a)(3) (1982), and upholding the proposed assessment of a civil

penalty in the amount of $1,100 for the violations. By order dated April 15, 1986, the Board granted the petition for discretionary review in this case, docketed as IBLA 86-627.

Clark Coal has also filed with the Board an application for review of the February 10, 1987, decision of Judge Torbett upholding Cessation Order (CO) No. 86-91-054-001 and denying Clark's application for temporary relief. This case has been docketed as IBLA 87-348. Pursuant to a motion filed by counsel for the Office of Surface Mining Reclamation and Enforcement (OSMRE), the two cases have been consolidated for consideration by the Board because they involve a common issue of law and fact which is dispositive of the result.

The permittee has had a hearing before Judge Torbett in each of the cases. For the sake of clarity, references to the transcripts of the hearings and exhibits are preceded by a I for IBLA 86-627 and a II for IBLA 87-348.

Both proceedings commenced with inspections by OSMRE officials at a 10-acre surface mining site in Scott County, Tennessee, 1/ permitted to Clark Coal under permit No. 80-91 issued effective April 15, 1980 (I Exs. 15, 16). 2/ NOV No. 84-091-162-006 (I Ex. 1) was issued by inspector Alan Boehms to Clark Coal as a consequence of his inspection of the site on September 5, 1984. The NOV cited Clark Coal for violations involving fail- ure to: (1) display mine and permit identification signs at points of access to the permit area; (2) pass all surface drainage through a sedimen- tation pond before leaving the permit area; (3) monitor surface water and/or submit surface water monitoring reports to OSMRE; and (4) failure to control discharge from sedimentation ponds to reduce erosion. At the hearing before Judge Torbett, the existence of the cited violations and the amount of the penalty assessed were not placed in issue--the sole issue raised was whether Clark Coal was the responsible permittee and, hence, was properly cited (I Tr. 5, 7). In his decision, Judge Torbett found that Clark Coal was the permittee and, thus, was properly cited for the violations.

1/ By notice published on Apr. 18, 1984 (49 FR 15496), after a hearing, OSMRE assumed direct Federal enforcement of the Tennessee State regulatory program pursuant to section 521(b) of SMCRA, 30 U.S.C. | 1271(b) (1982), on a finding that the State was not adequately enforcing the Act. Subsequently, approval of the State regulatory program was withdrawn and a Federal program was promulgated for regulation of surface coal mining and reclamation opera-tions on non-Federal lands. 49 FR 38874 (Oct. 1, 1984); see 30 CFR Part 942.

2/ Although the permit was issued in the name of "Clarks Coal Co.," the permittee was identified by its owner, Avery Leon Clark, Jr., as "Clark Coal Co." at the hearings and in other documents which are part of the record. For the sake of clarity, we have referred to the permittee as Clark Coal or Clark in this decision.

The second case arose as a consequence of an inspection by OSMRE inspector Shirley G. Goodin on January 17, 1986. As a result of the inspection, NOV No. 86-91-054-001 was issued to Clark Coal on January 17, 1986, citing permittee for certain violations on the site of permit No. 80-91 including the failure to: submit surface water monitoring reports, maintain access and haul roads on the permit area, and prevent rills and gullies deeper than nine inches on the permit site (II Ex. R-3). CO No. 86-91-054-001 which is the subject of this appeal was issued as a consequence of a follow up inspection on March 4, 1986, which disclosed no action had been taken to abate the violations by the deadline cited in NOV No. 86-91-054-001 (II Ex. R-7). In this case, after finding that the facts established the violations for which Clark Coal was cited, Judge Torbett further found that Clark Coal's efforts to assign its rights under its mining permit were ineffective to discharge its obligations as permittee. Accordingly, the Administrative Law Judge sustained the CO.

The brief of Clark Coal filed in IBLA 86-627 contends that shortly after obtaining the mining permit (No. 78-195) for the site, A. L. Clark, d/b/a Clark Coal Company, determined that due to financial difficulty he would be unable to conduct any mining operations. Thereupon, Clark endeavored to assign his mining permit for consideration to William Long d/b/a Brooks-Long Coal Company which latter party was the only operator to actually engage in surface mining operations at the site. Petitioner contends it executed a valid assignment of the permit to Long and properly relied on the representation of a Tennessee State inspector that a signed and notarized written assignment would be sufficient to substitute Long on the mining permit. Clark Coal contends OSMRE is estopped to cite it for violations of the Act in view of the representation by the State inspector and OSMRE's knowledge that operations were conducted on the site by Long. These same contentions are reiterated in the brief filed on behalf of Clark Coal in IBLA 87-348. In the latter case, Clark also asserts that the haul road was in fact a public road and not a part of the permit area (Petition for Review at 2).

In response to the briefs filed on behalf of Clark Coal, counsel for OSMRE points out that Clark applied for and was issued both the original mine permit for the site (No. 78-195) and the renewal thereof (No. 80-91). The answer contends that OSMRE officials are entitled to rely on the permit terms in enforcing the Act, any change in the permit terms must be docu- mented in the permit package, and, hence, Clark Coal was properly cited for the violations. OSMRE contends an agreement between a permittee and a third party is not sufficient to relieve the permittee of its responsibility under the Act. Further, the answer asserts that any purported assignment was superseded by the subsequent application for a renewed permit in the name of Clark Coal. Finally, OSMRE argues that it is not bound by the representation of a State inspector as to what is required to transfer a permit.

Accordingly, the issue raised by these two consolidated cases is whether Clark Coal as the permittee of record was properly held accountable for the cited violations.

Avery Leon Clark, Jr., owner of Clark Coal, acknowledged that Clark Coal was the permittee of the two permits issued for the site--the initial permit (No. 78-195) and the reissued permit (No. 80-91) (I. Tr. 10; I Exs. 15, 16). He further testified that shortly after receiving the initial permit, he went broke and sold the permit to Bill Long of Brooks-Long Coal Company (I Tr. 12; I Ex. 8; II Tr. 48; II Ex. A-2). The substance of the handwritten agreement provides:

> This is an agreement between Brooks, Long Coal Co. and Avery Leon Clark Dba Clark Coal Co. verifying that the 10,000.00 cash bond on permit #78-195 is to be returned to Brooks, Long Coal Co. at any time said bond money is released by State of Tenn. Dept. of Conservation, and releases Clark Coal Co. from any responsibility for reclamation or fines.

(I Ex. 8; II Ex. A-2). The agreement was signed by Avery Leon Clark as owner of Clark Coal and William H. Long. Although the date on the agreement is incomplete, it reflects it was executed in April 1979.

In response to a question at the hearing about the agreement, Clark testified:

> [W]e asked the State Inspector what we had to do to transfer permits from one owner to the other. He said all we had to do was to have an agreement between two parties verifying what we were doing and have it notarized so it could be filed, and that's exactly what I did.

(II Tr. 49). However, the evidence at the hearing indicated that no request for approval of a transfer of the permit was filed prior to expiration of the second permit on April 15, 1981 (II Tr. 40, 58, Ex. A-3).

Notwithstanding the agreement to sell the permit, Clark acknowledged subsequently signing an application in his own name to extend the previously issued permit at the request of Long (I Tr. 13, Ex. 16).

[1] Section 521(a)(3) of SMCRA, 30 U.S.C. | 1271(a)(3) (1982), provides, in pertinent part, that:

> When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or * * * during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent

> fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.
>
> If, upon expiration of the period of time * * * the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. [Emphasis added.]

Thus, it is clear from the terms of the statute itself that the permittee is properly cited for a violation of the Act and, in the event abatement of the violation is not timely achieved, a CO is properly issued. Wilson Farms Coal Co., 2 IBSMA 118, 87 I.D. 245 (1980). The Act also authorizes the assessment of a civil penalty against the permittee for a violation of the Act. 30 U.S.C. | 1268(a) (1982).

In Wilson Farms Coal Co., supra, the permittee argued that it was relieved of liability under the Act because it leased the coal deposit to a third party under an agreement by which the lessee purported to assume the responsibilities of the lessor for compliance with State and Federal laws. In response to this contention, the Department held that an agreement between a permittee and a third party regarding assignment of mining rights under the permit will not relieve a permittee of its obligations under the Act. Wilson Farms Coal Co., supra.

This is consistent with the requirement in section 511(b) of SMCRA that: "No transfer, assignment, or sale of the rights granted under any permit issued pursuant to this chapter shall be made without the written approval of the regulatory authority." 30 U.S.C. | 1261(b) (1982); see 30 CFR 774.17. This requirement is essential in order to promote compli- ance with the Act.

Under Departmental regulations, when a permit is transferred, assigned or sold to a third party, the applicant is required to provide the regula- tory authority with the legal, financial, compliance, and related informa- tion required by 30 CFR Part 778. 30 CFR 774.l7(b)(l)(iii). The applicant is also required to submit proof of sufficient performance bonding as required by 30 CFR Subpart 800. 30 CFR 774.l7(b)(3). The applicant is required to advertise the filing of the application in a newspaper circu- lated near the site of the mining operations. 30 CFR 774.l7(b)(3). The public may submit written comments on the application within a time pre- scribed by the regulatory authority. 30 CFR 774.l7(c).

The regulatory authority may allow the transfer, assignment, or sale of a permit to a successor only if it finds in writing that the applicant has complied with all the requirements set out at 30 CFR 773.l5(b) (review of violations); 30 CFR 773.l5(c) (adequate reclamation plan, mining in approved area, etc.); and 30 CFR Subpart 800 (performance bonding). 30 CFR 774.17(d).

The estoppel argument raised by Clark Coal must be rejected on several grounds. This Board has applied the basic elements of estoppel set forth by the court in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970), including (l) knowledge of the facts by the party to be estopped, (2) intent of the party to be estopped that his conduct shall be acted on, (3) ignorance of the facts by the party claiming the estoppel, and (4) detrimental reliance. See Peak River Expeditions (On Reconsideration), 98 IBLA 13 (1987). As a threshold matter, it is not clear from the record that there was actually a misrepresentation which Clark relied upon as the passage quoted above from Clark's testimony shows. Although the State inspector may have advised Clark regarding assignment of the permit, Clark failed to follow through on the advice by filing the assignment for approval. When asked by his counsel whether a copy of the purported assignment was "given to the State inspector," Clark testified: "As far as I know. Now, this was notarized right where he was. Whether somebody else gave him that or not, I don't know" (II Tr. 50). Regardless of whether a copy of this instrument was given to the State inspector, it appears from the record that no request for approval of a transfer of the permit was filed by Clark prior to expiration of the second permit. Not only did Clark fail to file the assignment with a request for approval, he subsequently applied for reissuance of the permit in name of his own company.

Further, the representation was made by a State inspector, not an official of OSMRE, the agency sought to be estopped. OSMRE is not bound by a State inspector's interpretation of the law. See Jewell Smokeless Coal Corp., 4 IBSMA 211, 89 I.D. 624 (1982).

Finally, we note that even if it had been represented to Clark that no approval of the assignment was necessary in order to relieve the permittee of liability under the permit, reliance on such a representation would simply be unreasonable in light of the statutory and regulatory provisions to the contrary discussed previously. All persons who deal with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Ward Petroleum Corp., 93 IBLA 267 (1986). Reliance upon erroneous information provided by a Government official cannot relieve one of an obligation imposed by statute and regulation. Parker v. United States, 461 F.2d 806 (Ct. Cl. 1972); Ward Petroleum Corp., supra. Clark Coal is properly charged with knowledge that, under SMCRA and the applicable regulations, an assignment of a surface mining permit is preconditioned on the written approval of the assignment by the regulatory authority. Accordingly, we must reject the estoppel defense.

We must also reject the contention that the haul road for which Clark was cited was a public road on the ground it is unsupported by the evidence. By definition, the affected area shall include roads used for access to or for hauling coal to or from surface coal mining and reclamation operations except where the road is designated as a public road in conformity with the law of the jurisdiction, is maintained with public funds and constructed in a manner similar to other public roads within the jurisdiction, and receives substantial public use. 30 CFR 701.5. Inspector Goodin testified that the

haul road where the violation was cited is within the permit (II Tr. 42-43); that the road where the violation was cited is not a public road (II Tr. 31); that he did not observe evidence of public maintenance of the road (II Tr. 44); and that he was not aware of any deed of the road to the county (II Tr. 44). Further, Clark acknowledged in his testimony that the haul road was in the permit (II Tr. 64).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.l, the decisions of the Administrative Law Judge are affirmed.

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C. Randall Grant, Jr.
Administrative Judge

We concur:

_____
James L. Burski
Administrative Judge

_____
John H. Kelly
Administrative Judge